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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

STERLING HAMILTON, - - - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the evidence was sufficient to support Petitioner's conviction.

2. Whether the trial court erred by not specifically instructing the jury as to the meaning of "corruptly".

3. Whether the prosecutor's comments on the Petitioner's failure to testify constituted reversible error.

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No.

STERLING HAMILTON, - - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Sterling Hamilton, respectfully prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Sixth Circuit rendered on June 30, 1982.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit appears in the Appendix hereto. The Judgment/Commitment Order of the District Court also appears in the Appendix hereto.

JURISDICTION

Jurisdiction is conferred upon the Court by virtue of Title 28, United States Code, Section 1254.

FEDERAL STATUTE INVOLVED

Title 18, United States Code, Section 1503:

"§1503. *Influencing or injuring officer, juror or witness generally*

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account or his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769."

STATEMENT OF THE CASE

This is an appeal from an Order of the United States Court of Appeals for the Sixth Circuit affirming the Petitioner's conviction in the United States District Court for the Eastern District of Kentucky, at Pikeville. The Petitioner was convicted of obstruction of justice, in violation of Title 18, United States Code, Section 1503.

The Grand Jury's Indictment conformed to the language of the statute and charged that the Petitioner had endeavored corruptly, or by threats or force to impede a prospective witness from testifying. The charge was unusual, from a review of the vast case law, in that it arose from a pending civil action in the United States District Court at Pikeville and involved an insurance claim of the Petitioner.

The government alleged that the Petitioner, a coal miner, visited one Orville Thompson, a prospective witness in the civil case, and threatened him for the purpose of impeding his testimony. The government's case centered on two visits the Petitioner made to Thompson's home in Tram, Kentucky, both occurring on April 7, 1981. The testimony of Thompson and his wife, Roscina, indicated that on the morning of April 7 the Petitioner appeared at their house and offered to pay Thompson for previous work done by him in the Petitioner's coal mine (TR 124). During this visit, the Petitioner stated to Roscina that he had work available for Thompson, and intended to oppose his black lung compensation claim on that basis. The

Petitioner also stated that he knew Thompson was lying in the pending civil case (TR 125). The government contended that these statements constituted a corrupt endeavor to impede Thompson's testimony.

The second incident the government viewed as a corrupt endeavor to impede testimony occurred later in the evening of April 7. The Petitioner and his mine superintendent, William Stewart, returned to Thompson's house and again offered payment to Thompson for mine work (TR 128). According to Thompson's testimony, the Petitioner would drink "enough to get his nerves up," (TR 73) and the discussion turned into a heated argument. The argument culminated with Thompson's wife knocking the Petitioner off the steps with a mattock handle (TR 130, 131). There was conflicting testimony as to whether the Petitioner ever brandished a pistol, although it was uncontroverted that the Petitioner did have a firearm on his person. Roseina Thompson testified that the Petitioner said he was going to kill Orville Thompson and another individual because Thompson had taken one hundred dollars in exchange for perjured testimony in the civil action (TR 129, 134). There was no testimony from any witness that the Petitioner threatened to impede or obstruct Thompson's testimony in the pending civil action, nor urged him in any manner to change his testimony to conform with the Petitioner's view of the case. The only mention of the civil case was the Petitioner's assertion of Thompson's alleged perjury.

There was, however, testimony at the trial that Thompson was very displeased that he had not re-

ceived money from the work previously done for the Petitioner's son at the Petitioner's family-owned mine, and Thompson made that fact well known in the small community (TR 243-245, 253-254). The outstanding debt owed to Thompson by the Petitioner and his son was clearly a source of friction between the two, wholly unrelated to any judicial proceedings. That fact, and the Petitioner's belief of the perjured testimony offered by Thompson, clearly indicated an alternative reason for the visits. More importantly, the prior dealings of both indicate the reasons why the second visit turned into a mountain fracas, reasons which had nothing to do with any intent to impede or obstruct Thompson's testimony.

Indeed, the testimony of Thompson and his wife, Roseina, was vague as to what actions by the Petitioner they perceived as threats, and when that perception was realized. Roseina testified on cross-examination that there was no trouble during the earlier visit (TR 140). On redirect examination, she testified that the Petitioner ". . . didn't make no threats at all that morning," (TR 150). It required the diligent persistence of the prosecutor (and two leading questions) to even get the witness to acknowledge any mention of the black lung compensation claim as a "threat".

Orville Thompson's perception of the events was even more clouded. He had testified in the civil case on April 21, 1981, two weeks after the complained of incident, that the reason he declined to go with the Petitioner was because "I had doctor's appointment and I would have been late for my doctor's appoint-

ment if I went with him," (TR 94). Thompson also stated that he was "afraid of the man," and this was before anything occurred between the two (TR 94). Petitioner developed a belief that the reason he declined to go with the Petitioner was because he knew "if I got in the car, I would not see Tram no more," (TR 94).

The Petitioner moved for an acquittal at the close of the government's case-in-chief (TR 200), and again at the close of the evidence (TR 298), and the Motions were denied by the trial court (TR 206, 299). Additionally, the Petitioner objected to the trial court's instructions that omitted any reference to "corruptly," and its refusal to allow the jury to see the Indictment which contained that qualifier (TR 302-309, 314-315). The Petitioner was convicted and received a sentence of eighteen months in the penitentiary.

The Petitioner took a timely appeal of this conviction to the United States Court of Appeals for the Sixth Circuit. The Court affirmed Petitioner's conviction on June 30, 1982, (Appendix p. 3). A timely Petition for Rehearing was denied by the Court on July 26, 1982. On August 9, 1982, the Court entered an Order staying mandate. From the Order of the United States Court of Appeals for the Sixth Circuit affirming Petitioner's conviction, Petitioner prays for a Writ of Certiorari.

ARGUMENT

The Writ should be granted because:

1. The evidence was insufficient to support Petitioner's conviction.

A review of the evidence offered at Petitioner's trial indicates an insufficient basis for his conviction of obstruction of justice. In *Anderson* v. *United States,* 215 F. 2d 84 (6th Cir. 1954), *cert. den.* 348 U. S. 888 (1954), the Court stated that the purpose of Title 18, United States Code, Section 1503, was to prevent "the corrupt effort to impede the orderly and due processes and administration of justice." Petitioner's acts did not constitute a corrupt effort directed towards interference with court proceedings, and the conviction should not stand.

What the evidence does show is a pattern of prior transactions between Petitioner and the government's chief witness, Orville Thompson, which culminated in several unfortunate, but innocuous, confrontations between the parties involved. As previously stated, Sterling Hamilton, Petitioner herein, believed that Orville Thompson had been paid by other parties to perjure himself in Petitioner's pending civil action to recover insurance money (TR 125). This, coupled with Petitioner's belief that Thompson could work and should not be receiving black lung compensation (TR 125) and the fact that Petitioner or his son owed Thompson money for work previously done (TR 124) shows ample reasons for the course of conduct that

transpired. This conduct had nothing to do with impeding a witness or obstructing the due administration of justice in federal court. The testimony of the prosecution's two chief witnesses, Orville Thompson and Roseina Thompson, indicated that the Petitioner came to their residence on two occasions, and on the second visit an altercation developed between Roseina and the Petitioner. The Petitioner threatened Orville Thompson and said "he had lied on him" (TR 129). The two, Roseina and the Petitioner, were yelling at each other in "sort of an argument" (TR 142). The Petitioner possessed a firearm at the time of the argument, but it was disputed whether it was ever drawn (TR 264). At best, this action by the Petitioner was a misdemeanor assault (as opposed to the assault and battery inflicted upon him by Roseina Thompson and her mattock handle).

The most troublesome aspect of the Defendant's conviction is the absence of evidence linking any of the transactions between the parties for the purpose of obstructing Orville Thompson's testimony, or that they occurred because Thompson was a witness in a federal proceeding. What convicted Thompson was an unfortunate juxtaposition between the ill-advised visits, the civil case, and the altercation with Roseina Thompson. The jury is never permitted to guess nor entertain conjecture on the essential elements of the crime. The visits by the Petitioner, and any words or actions incident thereto, must be proved beyond a reasonable doubt to have been done to obstruct or impede Thomp-

son's testimony. As stated in *United States* v. *Baker*, 494 F. 2d 1262, 1265 (6th Cir. 1974):

> "Particularly in view of the fact that 18 U.S.C. §1503 is a criminal statute which must be strictly construed, *United States* v. *Essex*, 407 F. 2d 214 (6th Cir. 1969), a threat in violation of the statute must relate to the possible testimony of the witnesses in a pending federal proceeding. . . . The mere existence of that federal proceeding is not sufficient to establish or support *any* inference that the federal proceeding was the focus of the alleged threat." (Emphasis added.)

In the *Baker* case, the court noted that past conduct between the parties involved "strongly indicates that the federal case in question was not the only conduct of George Johnson relating to Kilburn to which the alleged threat could have applied." If one substitutes the names of Sterling Hamilton and Orville Thompson in the above quotation, an accurate view of the case emerges.

A case factually similar and illustrative of the intent necessary for a conviction under 18 U.S.C. §1503, is *United States* v. *Kee*, 39 F. 603, 604 (D.S.C. 1889). The defendant was charged with violating Section 5399, Rev. St., a predecessor to the present 18 U.S.C. §1503. There had been allegations or insults exchanged between the defendant and a witness in a federal proceeding. The trial court instructed the jury that the jury must find that the defendant beat the witness because he was a witness *and* for the purpose

of influencing, impeding or intimidating him. Further, the court instructed:

> "If you are satisfied that the threats and consequent beating were uttered and inflicted because of this insulting charge against the old man, having no relation to the character of Corder as a witness without knowledge that he was a witness and induced entirely by the repetition of the insult, you may find the defendant not guilty."

Given the fact that there was ample testimony as to the reasons the Petitioner visited the Thompson's home, and only Thompson's vague assumption that "I knowed he would try to kill me . . . because I was coming up here to court" (TR 66), there was no showing that the alleged threats had any relation to the federal civil case. Following the logic of the Petitioner's conviction, a federal witness punched in the nose and threatened with death for flirtations with another's wife could hale the assailant into a United States District Court and have him convicted of a felony. Congress never intended such an absurd result in enacting the obstruction of justice statute and courts should refuse "to broaden the obstruction of justice statute beyond the scope that Congress gave to it," *United States* v. *Essex*, 407 F. 2d 214, 218 (6th Cir. 1969).

While other errors are asserted by the Petitioner, the most serious is the lack of evidence showing any endeavor to obstruct or impede Thompson's testimony or threaten him *because he was a witness.* In *United*

States v. *Solow*, 138 F. Supp. 812, 814, 815 (S.D. N.Y. 1956), that Court set out the test for a §1503 violation:

> "The test is whether the Defendant had knowledge or notice of information that the person he endeavored to intimidate or interfere with was or intended to be a witness either voluntarily or under subpoena in a pending matter, *and that it was because of such status that the Defendant corruptly endeavored to influence the witness.*" (Emphasis added.)

The first requirement was met in this case, the second was woefully lacking.

Petitioner was unquestionably angry with Thompson, but the quarrelsome visits that the government used to anchor its case were more susceptible to innocent inferences than to a showing that Petitioner endeavored to impede Thompson's testimony. The fact that Petitioner directed attention to Thompson's alleged perjury in the pending civil case, as well as to the earlier transactions between the men, does not prove the specific intent to do the forbidden act. While "any corrupt endeavor . . . constitutes obstruction of justice," *Roberts* v. *United States*, 239 F. 2d 467, 470 (9th Cir. 1956), either imploring a witness to testify truthfully, or confronting the witness with wholly unrelated matters are not corrupt endeavors. As the court stated in *Harrington* v. *United States*, 267 F. 97, 101 (8th Cir. 1920):

> "It is not an unlawful attempt to influence or impede a witness, or the due administration of

> justice, for one to seek to obtain from a witness a statement of the facts as he believes them to be, without the exercise of undue influence, even though such a statement may conflict with prior testimony given by the one making the statement."

It is only when a corrupt endeavor is made that the statute is invoked. In *Martin* v. *United States,* 166 F. 2d 76, 78 (4th Cir. 1948), the court implied that an innocent intent or lack of knowledge would not constitute an offense; the act must be done for an improper purpose. The government was required to prove beyond a reasonable doubt the following:

(1) At the time of the endeavor the victim was a witness in a federal proceeding.

(2) At the time of the threat, the defendant knew the witness was involved in the proceeding.

(3) The federal proceeding was the focus of the threat.

While the first two factors were without question, the third was not proven beyond a reasonable doubt, and is the most crucial element in defining a "corrupt endeavor." The Petitioner should be granted Certiorari.

2. The trial court erred by failing to charge the jury concerning "corruptly."

Despite repeated requests by Petitioner, the trial court refused to instruct the jury as to the meaning of "corruptly," though both the indictment and the statute used that term. There is no question that "the

statute is broad enough to cover any act committed corruptly, in an endeavor to impede or obstruct the due administration of justice," *Samples* v. *United States,* 121 F. 2d 263, 266 (5th Cir. 1941). In *Cole* v. *United States,* 329 F. 2d 437, 442 (9th Cir. 1964), *cert. den.* 377 U. S. 954 (1964), the Court said, "A reading of 18 U.S.C. §1503, limits the acts proscribed to those done with a 'corrupt' motive. The Court instructed in the language of the statute, and emphasized that only *corrupt* methods were prohibited; *corrupt* influence was the only influence proscribed; that only 'an act committed *corruptly* was to be considered. . . .' The Court thoroughly instructed on the specific intent necessary to be found in a case such as this" (emphasis in original). As the Supreme Court said in *Pettibone* v. *United States,* 148 U. S. 197, 207 (1893):

> "The specific intent to violate the statute must exist to justify a conviction, and this being so, the doctrine that there may be a transfer of intent in regard to crimes flowing from general malevolence has no applicability."

A defendant must endeavor to accomplish the forbidden act, and endeavor "describes any effort or essay to accomplish the evil purpose that the statute was enacted to prevent," *Osborn* v. *United States,* 385 U. S. 323, 333 (1966). However, "a specific intent to impede the administration of justice is an essential element of this offense," *United States* v. *Johnson,* 585 F. 2d 119, 128 (5th Cir. 1978). As that Court noted:

> "The Court instructed the jurors that to return a verdict of guilty they must find beyond a reasonable doubt that the defendant had the specific intent to do an act the law forbids. That is, to corruptly endeavor to influence or impede the witness in the discharge of her duty. The use of the word 'corruptly' pervaded the charge. A reasonable jury exercising common sense could not have been deceived into thinking that a good faith effort to obtain the presence of a reluctant witness or to urge truthful testimony is contemplated within the meaning of 'corrupt endeavors'."

The trial court further instructed the jury as to the definition of "willfully" and stated that the acts must be for a "bad, evil or wicked purpose, either to disobey or disregard the law" (TR 346). It is Petitioner's contention that the failure to define or interject "corruptly" into the instructions unduly weakened his defense of having no corrupt intent in the several encounters that occurred between the Petitioner and Orville Thompson, the prospective witness in the civil action. Unlike the *Johnson* case, a reasonable jury could have been deceived into thinking that an attempt to urge truthful testimony, or some other unrelated reason for a threat, was wrong. The Petitioner is not asserting that he was not fairly apprised of the crime charged by the omission of "corruptly", *Seawright* v. *United States,* 224 F. 2d 482 (6th Cir. 1955), but that the omission removed the element of specific intent in the minds of the jurors. This tendency was further compounded by the trial court's refusal to allow the jury to take a copy of the straight-

forward, one paragraph indictment to the jury room. Petitioner recognizes that trial courts exercise discretion in decisions to furnish an indictment to the jury, *Garner* v. *United States*, 244 F. 2d 575 (6th Cir. 1957), *cert. den.* 355 U. S. 832 (1957), but asserts that the effect of the trial court's refusal to mention "corruptly", or to allow the jury to see the indictment using the phrase, was to convict him of a crime he lacked the specific intent to commit.

3. The prosecutor's closing argument was an impermissible reference to Defendant's failure to testify.

During closing arguments, the Assistant United States Attorney stated to the jury:

> "And think about it, ladies and gentlemen. Here is pathetic Orville Thompson. He is out of work. He is hardly a threat to a Sterling Hamilton. Why, if you believe Orville Thompson's or Sterling Hamilton's witnesses, his friends who came up here and said, you can't believe a word Orville Thompson said, or the brother-in-law who never got along with Orville Thompson said you can't believe a word he said, what have you got to worry about.
>
> His remedy was to come up here if he thought he was lying, put on his witnesses that say Orville Thompson was not telling the truth because that's the way our judicial system works, ladies and gentlemen. That is the whole point. We don't live in a vigilante system." (Supp. TR 9-10)

While apparently referring to the pending civil action that prompted the obstruction of justice indict-

ment, the prosecutor did not make that fact clear to the jury, and such reference should not have been made at all. It is dangerous to mix references to contested civil cases whereby one brings his witnesses in to tell their side of the story with a criminal case, which requires a defendant to do absolutely nothing, present no witnesses, and demand the government to prove him guilty beyond a reasonable doubt.

In *Chapman* v. *California*, 386 U. S. 18, 24 (1967), it was held that a defendant in a criminal case cannot be penalized for exercising the constitutional privilege not to testify, and that the test for references made to the failure of a defendant to testify is: "The court must be able to declare a belief that it was harmless beyond a reasonable doubt."

The prosecutor's reference was probably inadvertent, but even "a single misstep on the part of the prosecutor may be so destructive of the right of the defendant to a fair trial that reversal must follow," *Pierce* v. *United States*, 86 F. 2d 949, 952 (6th Cir. 1936). The reference to Petitioner's ability to produce witnesses in the civil action could easily confuse the jury as to that same defendant's refusal to take the stand in the criminal case. The average juror would think "the defendant did not prove then that peop'e were taking money to perjure themselves, even though he had witnesses. He did not tell us why he believed that. What is he hiding?" While most of the cited cases involve more blatant efforts to call the jury's attention to the failure of a defendant to testify, no distinction should be made on the basis of subtlety.

The criterion as "whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify," *Knowles* v. *United States*, 224 F. 2d 168, 170 (10th Cir. 1955).

The prosecutor's closing argument was objected to, and Petitioner's request for a mistrial was refused (TR 334). The Petitioner made it clear to the trial court that no further reference or admonishment should be made on the failure of the Petitioner to testify (TR 334, 355).

Despite this request, the trial court instructed the jury that "no inference whatever may be drawn from the election of the defendant not to testify" (TR 341). By giving this instruction, after Petitioner requested no further reference to the matter, the trial court unwittingly reinforced and emphasized from the bench the Petitioner's failure to testify. The prosecutor's reference, combined with the declined, but given, admonishment emphasized to the jury that the Petitioner did not testify in his own behalf and did not challenge the government's witnesses. In this case, hinging almost entirely on the Petitioner's state of mind, the references were harmful, prejudicial and may very well have tipped the scales toward conviction.

CONCLUSION

For all the foregoing reasons, a Writ of Certiorari should issue to review the Opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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